IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FLORENCE MARTHA LEDLOW, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11437 Trial Court No. 3AN-09-7790 CI MEMORANDUM OPINION No. 6255 — November 18, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

After pleading no contest to felony driving while under the influence,[1] Florence Martha Ledlow filed an application for post-conviction relief asserting that she should be allowed to withdraw her plea because her privately-retained attorney had provided ineffective assistance of counsel in connection with the plea. The superior court denied the application following an evidentiary hearing. Ledlow now appeals. For the reasons explained here, we conclude that the superior court did not err in denying Ledlow's application for post-conviction relief.

Factual background and prior proceedings

On February 4, 2007, at 2:45 p.m., Florence Ledlow arrived at her job for Guardsmark, a security contractor, at the Federal Express facility near the Anchorage airport. Ledlow smelled strongly of alcohol. When Ledlow's supervisor questioned her about why she smelled so strongly of alcohol, Ledlow initially told the supervisor that she had been drinking the night before. But she later said that she had been drinking that morning. Ledlow also told the supervisor that she had driven herself to work.

The supervisor told Ledlow that she was too intoxicated to work and that he wanted someone to drive her home. When Ledlow refused this offer, the supervisor contacted the senior supervisor, who in turn contacted the airport police. Ledlow's supervisor had other employees watch Ledlow because Ledlow was still in possession of her car keys and the supervisor was worried that she would drive away on her own.

When the airport police arrived, they too observed that Ledlow smelled of alcohol and had bloodshot and watery eyes. The police administered field sobriety tests,

[1] AS 28.35.030(n).

which Ledlow did not pass. A subsequent DataMaster test revealed that Ledlow had a blood-alcohol concentration of .112 percent, which is over the legal limit of .08.[2]

Because she had two prior convictions for driving while under the influence, Ledlow was charged with felony driving while under the influence. Following her arrest, the police impounded Ledlow's car, which was parked in the employee parking lot.

Ledlow was initially represented by an assistant public defender, who moved to suppress Ledlow's statements about driving to work on the ground that she had been improperly detained by the security guards and had not been properly Mirandized by either the security guards or the police.

Ledlow later retained a private attorney, Gayle Brown, who filed other similar suppression motions on Ledlow's behalf. Ultimately, upon Brown's advice, Ledlow entered a *Cooksey* no contest plea to the felony DUI charge, reserving her right to appeal the suppression issues in her case.[3] Ledlow was sentenced to 24 months with 20 months suspended (4 months to serve), 3 years of probation, and a $10,000 fine.

After Ledlow was sentenced, she filed a timely appeal to this Court, but she later moved to dismiss her appeal. This Court granted her motion in May 2009. Ledlow then filed an application for post-conviction relief, seeking to withdraw her plea on the grounds of ineffective assistance of counsel. Ledlow asserted that her privately-retained attorney had provided ineffective assistance by failing to sufficiently investigate whether the State had evidence other than Ledlow's statements regarding whether (and when) she

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[2] AS 28.35.030(a)(2).

[3] *See Cooksey v. State*, 524 P.2d 1251 (Alaska 1974).

had last driven, and by failing to advise her that she could have pursued the defenses of delayed absorption and *corpus delicti* if she had taken the case to trial.

Included with the application for post-conviction relief was an affidavit from Gayle Brown in which she admitted that she did not discuss these alternative defenses with Ledlow. In the affidavit, Brown also declared that her investigation of Ledlow's case fell below the standard for minimal competence. Ledlow's application for post-conviction relief also included an affidavit from an investigator hired by her post-conviction relief attorney. The investigator's affidavit stated that there was a security camera aimed at the entry to Ledlow's place of work which could have shown if, and/or when, Ledlow drove to work that day, but that the footage had been erased about thirty days after the incident and was no longer available.

Following an evidentiary hearing at which Brown and the post-conviction investigator testified, the superior court denied Ledlow's application on its merits. This appeal followed.

Why we conclude that the superior court did not err in denying Ledlow's application for post-conviction relief

Under Alaska law, a defendant is entitled to withdraw a guilty plea if the defendant can prove by clear and convincing evidence that she received ineffective assistance of counsel from the attorney who advised her to enter the plea.[4] The test for ineffective assistance of counsel has two prongs: first, the defendant must prove by clear and convincing evidence that the attorney failed to provide legal assistance within the range of competence expected from criminal law practitioners; and second, the defendant

[4] *Risher v. State*, 523 P.2d 421, 424 (Alaska 1974); *Garay v. State*, 53 P.3d 626, 627 (Alaska App. 2002); *Arnold v. State*, 685 P.2d 1261, 1264-66 (Alaska App. 1984).

must show that there is a reasonable possibility that the attorney's lack of competence affected the outcome of the proceedings.[5]

In order to render effective assistance during a plea, an attorney must be sufficiently familiar with the facts of the case and the applicable law so that the attorney can fully advise the defendant of the options available to her.[6]

Here, Ledlow alleges that her private attorney was insufficiently familiar with the facts of her case because she failed to properly investigate it. Specifically, Ledlow alleges that her attorney was incompetent in failing to secure the security camera recording of the employee parking lot. But, as the superior court found, this security footage was destroyed thirty days after the incident and long before the private attorney was hired in this case. We therefore agree with the superior court that the attorney's failure to investigate the security footage — whether or not incompetent — could not have made a difference in Ledlow's case.[7]

Ledlow also alleges that her attorney was incompetent for failing to advise her about a possible *corpus delicti* defense. (The *corpus delicti* rule requires the government to produce foundational evidence substantially corroborating a defendant's confession in order to introduce it, but this corroborating evidence need not independently prove commission of the crime.[8]) According to Ledlow, the only evidence that she drove to work that afternoon was her own admission to her supervisor;

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[5] AS 12.72.040; *Garay*, 53 P.3d at 626-27.

[6] *Arnold*, 685 P.2d at 1265.

[7] *See Risher*, 523 P.2d at 424.

[8] *See Langevin v. State*, 258 P.3d 866, 871 (Alaska App. 2011); *Dodds v. State*, 997 P.2d 536, 538-39 (Alaska App. 2000).

there were no witnesses to her driving, no security camera footage of her driving, and nobody checked to see if her car's engine was still warm or if the car keys she had on her person belonged to that car.

The superior court rejected this argument, finding that there was evidence that sufficiently corroborated Ledlow's admission that she drove to work that day. This evidence includes the presence of Ledlow's car in the parking lot and the fact that she had car keys on her person. We agree with the superior court that, given the facts of Ledlow's case, she did not have a viable *corpus delicti* defense and her attorney was therefore not incompetent for failing to advise her of this defense.

Lastly, Ledlow alleges that her attorney was incompetent for failing to advise her of a possible delayed absorption defense. The superior court found that the attorney's failure to recognize a possible delayed absorption defense did not fall below the minimum standard of competence because such a defense appeared to be statutorily barred at the time of Ledlow's plea.[9]

In 2004, the legislature amended Alaska's DUI statute to prohibit a defendant from raising a delayed absorption defense.[10] (A delayed absorption defense — also referred to as the "big gulp" defense — relies on retrograde extrapolation of a person's chemical test result to argue that the person's blood-alcohol level at the time of driving was actually below the legal limit.[11]) In 2009, the Alaska Supreme Court issued *Valentine v. State*, which struck down the statutory bar against the delayed absorption

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[9] Former AS 28.35.030(a)(2), *invalidated by Valentine v. State*, 215 P.3d 319 (Alaska 2009).

[10] *See Valentine*, 215 P.3d at 320.

[11] *Id.* at 327 n.12.

defense as unconstitutional when applied to persons charged under the "impairment theory" of DUI.[12] But, at the time of Ledlow's case, the Alaska Supreme Court had not yet issued *Valentine.* We therefore agree with the superior court that Ledlow's attorney cannot be found incompetent for failing to raise a defense that appeared to be statutorily prohibited at the time of her representation.[13]

Moreover, we disagree with the underlying premise of Ledlow's claim, which is that she had a viable delayed absorption defense that any competent attorney would have recognized and advised her to take to trial. *Valentine* struck down the statutory bar against the delayed absorption defense when applied to persons charged under the impairment theory of DUI, it upheld the statutory bar when applied to persons charged under the .08 blood-alcohol theory. Because Ledlow was charged under both theories, the delayed absorption defense would not have assisted her in defending against the .08 blood-alcohol theory.[14]

Ledlow asserts that the State would have been forced to proceed only on the impairment theory, because it had "no evidence" that her breath test was administered within the four-hour statutory window. But this is incorrect. Ledlow told her supervisor that she had drunk alcohol that morning and driven to work that afternoon. The record

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[12] *Id.* at 327. AS 28.35.030 provides that a person may commit a DUI offense in one of two ways. Under the "impairment" theory, it is a crime to drive "under the influence" of alcohol, regardless of blood-alcohol level. *See* AS 28.35.030(a)(1). Under the "blood-alcohol level" theory, a person is guilty of DUI if his blood-alcohol level is .08 or more "within four hours after the alleged operating or driving." *See* AS 28.35.030(a)(2).

[13] *Cf. Clark v. Arnold,* 769 F.3d 711, 727 (9th Cir. 2014) ("[W]e do not expect counsel to be prescient about the direction the law will take.") (original citations omitted).

[14] *Valentine*, 215 P.3d at 326.

indicates that Ledlow arrived at her workplace at 2:45 p.m., fifteen minutes before her scheduled 3:00 p.m. shift. The breath test, which revealed a blood-alcohol level of .112 percent, was administered at 4:32 p.m. — one hour and forty-seven minutes after she arrived. Given this timeline, it was not incompetent for Ledlow's attorney to fail to recognize or advise Ledlow about a potential delayed absorption defense, even under post-*Valentine* law.

Conclusion

We AFFIRM the judgment of the superior court.